In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1604

JERRY S. NIEZEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his conviction and that he was denied effective assistance of counsel because the court of appeals affirmed his conviction without oral argument.

Following a jury-waived trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of conducting an illegal gambling business involving five or more persons and of conspiring to do so, in violation of 18 U.S.C. 1955 and 371. He was sentenced to concurrent terms of three years' imprisonment, with all but six months suspended, placed on probation for three

years, and fined $5,000. The court of appeals affirmed (Pet. Apps. C and D).[1]

The evidence presented at trial consisted of a stipulation (Gov. Exh. 1). The stipulated facts show that in 1972 petitioner was part of a large pyramidally structured illegal gambling operation centered in Beaumont, Texas, involving betting on college and professional football games. At the top of the operation was James Tuppen, who determined the betting line and took lay-off bets; at the bottom were petitioner and other bookmakers,[2] who used the betting line and placed the lay-off bets. Between the bookmakers and Tuppen were the middlemen—Marion Johnsom and Robert Carter—who disseminated the betting lines determined by Tuppen and picked up the lay-off bets from the bookmakers.

Petitioner and the other bookmakers profited by collecting a 10% surcharge on each bet and balancing their bets for each game. Thus, if an equal amount was bet on each team, money from the losers would cover the amounts won by the winners, and petitioner would retain the 10% surcharge. Often, however, the bookmakers would have uneven betting on certain games. To balance their books they would then place "lay-off" bets with other bookmakers. Petitioner and co-defendants Sekaly and Lefkowitz

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[1]This Court has granted certiorari in *United States* v. *Iannelli*, No. 73-64, to consider whether there can be separate convictions for conspiracy and for a substantive offense under 18 U..C. 1955, but that issue, which petitioner has not raised at any point in these proceedings, need not be reached here because the sentences for the separate offenses were made concurrent. *Barnes* v. *United States*, 412 U.S. 837, 848, n.16.

[2]Raymond Lefkowitz, Walter Sekaly, Vernon Roberts, Frank Ferguson and Richard Sanders. In addition, Robert Carter, Herbert Mitchell and Willie Griggie took bets directly for Tuppen.

all "layed-off" their bets with the same middleman, one Marion Johnson, or his assistant, Dr. Richard Jones. Johnson in turn would lay off his uneven bets with James Tuppen.

In addition to laying off bets with the middlemen, petitioner and the other bookmakers in the operation received from them information on the betting line for specific football games. The middlemen got this information from Tuppen, who got if from various sources around the country. The betting line consisted of a point spread or odds between the two teams involved in a specific game.[3]

1. Petitioner contends that his conduct was not prohibited by 18 U.S.C. 1955 because there was not one operation, but only a number of small, separate gambling operations, each involving fewer than the five persons required for violation of Section 1955. To support this position, petitioner points to the fact that the bookmakers not only did not work together, but were in competition with each other.

In *Blumenthal* v. *United States*, 332 U.S. 539, 558, this Court, faced with the same argument in a situation where a number of salesmen were separately selling whiskey furnished by one source in violation of the Emergency Price Control Act, stated: "By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

Here the facts show that petitioner and the other bookmakers were parties to the same large common plan based

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[3]The giving of a point spread or odds was very important. Since teams were rarely exactly evenly matched in any given football game, it was necessary to give points or odds on the game in order to get balanced betting.

on the same single goal. They were all participants in one large pyramidally structured gambling operation, the essence of which was the dissemination of a betting line and the placing of lay-off bets between the parties. Moreover, by laying off their bets to the same person, they were in effect indirectly balancing their books with each other, thus combining their profits and losses among themselves.

2. Petitioner's contention that the determination of his appeal without oral arguments deprived him of his Sixth Amendment right to effective assistance of counsel is without merit. This Court has held that the Constitution does not require oral arguments in all cases. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 276. At least two circuits now decide some cases without oral argument. See *Huth* v. *Southern Pacific Company*, 417 F. 2d 526 (C.A. 5); *National Labor Relations Board* v. *Local 42, International Ass'n of Heat & F.I. & A. Workers*, 476 F. 2d 275, 276 (C.A. 3); *United States* v. *Revel*, 455 F. 2d 608 (C.A. 5), certiorari denied, 407 U.S. 922.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.